

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date of Decision: 25-10-1996.

SPECIAL CIVIL APPLICATION No. 8077 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

MAKWANA RAVJIBHAI RANCHHODBHAI

Versus

MANIBEN WD/O. ICHHAGIR DAYAGIR & OTHERS

Appearance:

Mr. M.D. Rana, Advocate for the petitioner.

Mr. Jitendra M. Patel, for Mr.J.M.Chauhan, Advocate for the Respondents.

CORAM : MR.JUSTICE H.R.SHELAT

25/10/96

ORAL JUDGEMENT

The order dated 18th April 1990 passed by the Gujarat Revenue Tribunal in Restoration Application No. TEN.D.A. 9/90 dismissing the same for default of appearance, is under challenge in this petition filed under Article 226 of the Constitution of India.

2. The respondents were the owners of agricultural lands bearing Survey Nos. 31/2/1, 31/2/2 and 38 situated within the local limits of village Ramnagar in Anand Taluka. They sold

the said land under a Sale Deed dated 28th April 1964 to the petitioner. Since then the petitioner is in possession of the land. The Mamlatdar & ALT at Anand initiated the proceedings under Section 84-C of the Bombay Tenancy Act and passed the order of eviction on 16th August 1976. Being aggrieved by the order, the petitioner preferred the appeal being Tenancy Appeal No. 830/76-77 which came to be rejected on 31st May 1985. Against that order the petitioner preferred the Revision Application being TEN.B.A. 139/86 which was listed for hearing on 18th August 1989. On that day, no one appeared on behalf of the petitioner and therefore the Tribunal dismissed the Revision Application for default of appearance. Having later on come to know about the order passed, the petitioner moved an application for restoration of the Revision Application dismissed for default of appearance. The Restoration Application was fixed for hearing on 26th March 1990. On that day, the Clerk of the Advocate engaged by the petitioner prayed for time and therefore the Restoration Application was adjourned to 18th April 1990. On that day no one appeared on behalf of the petitioner. The Tribunal then dismissed the Restoration Application for default of appearance on that day. By filing this petition, the legality and propriety of that order is called in question.

3. According to the petitioner the order, passed by the Gujarat Revenue Tribunal, is nothing but capricious exercise of power. He had engaged the Advocate and he was not supposed to remain present before the Tribunal and for the fault of the Advocate he should not be made to suffer. On that day the respondent No.2 was not served. The Tribunal ought to have adjourned the matter till the respondent No.2 was served and ought not to have hurriedly passed the impugned order.

4. Against such submission, Mr. Jitendra M. Patel, the learned Advocate representing the respondents, has contended that the order passed by the Tribunal is neither capricious nor perverse but quite in consonance with the provisions of law. If at all it appears to be highly technical and not palatable to the other side this Court should be slow in interfering with such order when passed in accordance with law. There is therefore no cause to interfere with the order passed. The Tribunal had fixed the matter for final hearing. The petitioner and his Advocate were therefore supposed to remain present on that day and proceed with the matter. On the next date fixed no one appeared on behalf of petitioner. There was hence no option left with the Tribunal but to dismiss the petition for default of appearance, and if the powers vested are accordingly exercised, the matter calls for no interference.

5. The only question that arises for consideration is

whether the restoration application should be restored to file if the advocate engaged by the party does not appear before the Tribunal. If neither the petitioner nor his advocate appears before the Court/Tribunal, in law it is open to the Court/Tribunal to dismiss the matter for default of appearance and such order cannot be condemned on any ground for the order can be said to be legal and valid although it may not be palatable to any of the parties. The Court/Tribunal is not obliged in law to wait for the party or his advocate, or adjourn the matter it may however adjourn if it thinks it fit. If it does not adjourn or wait and prefers to dismiss the matter, the action being legal and valid cannot be criticised or condemned on any ground and the same would call for no interference in writ petition. But the Court will interfere if injustice is caused despite lawful exercise of powers. A decision of the Apex Court may at this stage be recollected. In the case of Rafiq & Anr. vs. Munshilal & Anr. - AIR 1981 S.C.1400 it is laid down that if the party engages the advocate, because of the legal system, he remains confident that his lawyer will take care of the matter and his interest would be protected. He also cultivates the belief and rightly so that in appeal or revision after the advocate is briefed, he is not supposed to remain present unless specifically asked to appear in person. In that case if the advocate engaged by the party does not appear and the petition is dismissed for default, the party should not suffer for the inaction or deliberate omission or misdemeanour of his counsel. In that case the appeal dismissed for default of appearance of the counsel was restored to file and the costs was directed to be recovered from the appellant's counsel who absented himself. This decision being binding on this Court has been followed by this Court in Patel Karshanbhai Dwarkadas vs. State of Gujarat 1994 (1) G.C.D. 578 wherein relying on the decision of the Supreme Court dismissal order was upset. In view of the aforesaid ruling of the Supreme Court in the case of Rafiq (Supra), the Restoration Application filed by the present petitioner is required to be restored because he cannot be made to suffer for the inaction on the part of his advocate. After he engaged the advocate it was for the advocate to appear before the Tribunal and proceed with the matter. The petitioner was never asked to appear in person. Further the power to dismiss even if lawfully exercised, injustice can be said to have been caused if the agent engaged remains inert, or does not appear.

6. At this stage, my attention is drawn to a decision rendered by this Court in the case of Dahyabhai Somabhai & Anr vs. Ramaji Kesarji & Ors - 12 G.L.R. 809, wherein it is laid down that whether to issue a writ of certiorari or not is the discretion of the High Court, and the discretion should not be exercised in favour of the party found to have done wrong

because a wrong-doer cannot take advantage of his own wrong. In that case, the petitioner, was blameable because he was claiming the relief about the land contrary to the provisions of the Bombay Tenancy Act, he had purchased, and that was a wrong in the eye of law, which was not encouraged by this Court refusing to grant the relief. By citing this decision the learned advocate wanted to benumb and stupify the effects of the decision in the case of Rafiq (Supra). Here in this case, the petitioner cannot be said to be the wrong-doer by abstaining from appearing before the Tribunal. He was not supposed to appear as his advocate was to appear and proceed with the matter. He did not instruct his advocate not to appear and delay the finality in the matter. He also did not become a party to the design, if at all there be any of his advocate, nor a party to the inaction or omission on the part of his advocate. There is nothing on record going to show that remaining behind curtain he had cabaled. In short, for the absence of his advocate the petitioner is not blameable. He had already engaged the Advocate and briefed him. He was thereafter honestly confident that his advocate would take care of the matter, appear before the Tribunal and do needful in the matter on his behalf. His non-appearance therefore cannot be termed a wrong in the eye of law; and consequently he cannot be said to be the wrong-doer. In view of this distinctive feature of the case, the principle enunciated in the decision cited on behalf of the respondents rendered in the case of Dahyabhai Somabhai (Supra) cannot be pressed into services of the respondents. Consequently it cannot be said that respondents have succeeded in avoiding the operation of the binding effect of the decision in the case of Rafiq & Anr. (Supra).

7. In view of the binding and applicable decision of the Supreme Court in the case of Rafiq (Supra), the present petition is required to be allowed, and the order passed by the Tribunal dismissing the Restoration Application for default, is required to be quashed. In this case, right from 1976 the parties are battling for their rights and though about 20 years have rolled by, there is no end to the matter. In this case, if the application for restoration of the Revision Application is restored to file, that would not serve the purpose. That may again delay the final decision in the Revision Application because the order that may be passed hearing the parties in Restoration Application may be challenged and that would also consume few years for getting the redressal of the grievances finally. It would be, in view of the matter, proper if the Revision Application, which is dismissed for default of appearance, is also restored to file setting aside the order of dismissal.

8. In the aforesaid circumstances, the petition is allowed. The order dated 18th April 1990 dismissing the Restoration

Application for default of appearance and the order dated 18th August 1989 dismissing the Revision Application for default of appearance, are quashed and set aside. The Revision Application No. TEN.B.A. 139/86 is restored to file. The Gujarat Revenue Tribunal is directed to dispose of the Revision Application hearing the parties in accordance with law, latest by 10th March 1997. The parties shall appear before the Gujarat Revenue Tribunal and will proceed with the matter without praying for time so as to enable the Tribunal to dispose of the matter within the specified time.

9. The petitioner shall pay the costs of this petition to the respondents which is quantified at Rs. 3,000/-. The respondents or his Advocate Shri J.M. Chauhan will be free to withdraw the amount deposited by the petitioner in Court on 27th February 1991, under the order of this Court, so as to satisfy the claim of costs. Rule is made absolute.

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